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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

WALTER N. DIMMICK, APPELLANT,
v.
JOHN W. TOMPKINS, WARDEN OF THE STATE PRISON of the State of California at San Quentin. } No. 528.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLEE.

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This case was decided by the circuit court upon the petition alone, neither the writ prayed nor a rule to show cause being issued, and therefore no return made. In denying the petition, the circuit court rendered no opinion.

The petition shows on its face that Dimmick has not served his sentence.

The judgment and sentence of the district court was as follows (record, 2–3):

> That whereas the said Walter N. Dimmick having been duly convicted in this court of making and presenting [a] false claim, as charged in the first count of the indictment, and using a

portion of public moneys of the United States, to wit, the sum of $498.37, for a purpose not prescribed by law, as charged in the fourth count of the indictment:

It is therefore ordered, adjudged, and decreed that the said Walter N. Dimmick be, and he is hereby, sentenced to be imprisoned at hard labor for the term of two years from October 16, 1901; and it [is] further ordered that said sentence of imprisonment be executed upon the said Walter N. Dimmick by imprisonment in the State prison of the State of California, at San Quentin, Marin County, California.

The petition, filed October 19, 1903, states that "the said Walter N. Dimmick has been imprisoned under said judgment in the State prison ever since the 13th day of April, A. D. 1903," thus clearly showing that his time—two years—has not expired.

The allegation that prior to April 13, 1903, and from the date of the sentence, October 16, 1901, Dimmick was confined in the *county jail* "under said judgment" is inconsistent with the judgment, which was for imprisonment in the State prison.

The material part of the sentence was that Dimmick be imprisoned for *two years* at hard labor in the *State prison.*

The *time* from which the sentence was to commence was directory merely.

Ex parte Bell, 56 Miss., 282.
Ex parte Duckett, 15 S. C., 210.

The general rule is that the time when the imprisonment is to begin or end need not be and, according to the better practice, is not specified in the sentence, it being sufficient to state its duration merely.

> Bish. New Crim. Proced., sec. 1310, par. 3.
> 25 A. & E. Ency. Law (2d ed.), p. 303, and cases cited in note.

The rule as to the *place* of imprisonment is different. According to the prevailing practice, when the sentence is imprisonment the place of imprisonment should be specified.

> 25 A. & E. Ency. Law (2d ed.), p. 302, and cases in note.

The nature of the punishment—whether infamous or not—depends upon the place of imprisonment. Imprisonment in a State prison or penitentiary, with or without hard labor, is an infamous punishment.

> *Ex parte Wilson*, 114 U. S., 417, 428.
> *Mackin* v. *United States*, 117 U. S., 348, 352.
> *United States* v. *De Walt*, 128 U. S., 393.

The records of this court show that Dimmick was not confined under the judgment in the county jail prior to his removal to the State prison, but that said judgment had been superseded pending his appeals.

In his petition for a writ of certiorari to the circuit court of appeals for the ninth circuit, filed in this court February 2, 1903 (No. 592, October term, 1902, Walter N. Dimmick *v.* United States), for the purpose of obtaining a review of the case in which the judgment

in question was rendered, the petitioner, by his counsel, after reciting the verdict of the jury, said (petition, 16, 17):

> To which verdict, so far as the same is against him, the defendant then and there duly excepted. That thereafter, and on the 16th day of October, A. D. 1901, the said district court denied your petitioner's motion in arrest of judgment, to which ruling he duly excepted, and sentenced your petitioner to imprisonment in the penitentiary at hard labor for the term of two years; that thereafter, and on the 17th day of October, A. D. 1901, your petitioner sued out and served and there was allowed him a writ of error upon said judgment from the United States circuit court of appeals for the ninth circuit, *and obtained a supersedeas on said writ of error and addressed to said judgment;* that thereafter, and on the 18th day of December, A. D. 1901, the record upon said writ of error, as well as the cause itself, were filed and docketed in the United States circuit court of appeals for the ninth circuit.
>
> 3. That thereafter said cause, upon said writ of error, was in due course argued in said circuit court of appeals, before Judges Ross, Hawley, and Gilbert, and submitted to the court for its decision; that subsequently and on the 5th day of May, A. D. 1902, by the decision of the said circuit court ot appeals, in an opinion written and delivered by Judge Ross, the said judgment of the said district court was affirmed; that thereafter and on the 10th day of November, A. D. 1902, the said circuit court of ap-

peals denied your petitioner a rehearing; that to the said judgment of the circuit court of appeals and to the said order denying a rehearing your petitioner duly excepted; that thereafter, to wit, on the 12th day of January, A. D. 1903, the mandate of said circuit court of appeals was filed in the said district court upon said judgment of affirmance; *that on the 13th day of January, A. D. 1903, the said district court ordered that execution of the judgment be stayed for the period of thirty days from that date, to enable your petitioner to make application to your honorable court for a writ of certiorari.*

On page 4 of the record which accompanied Dimmick's petition for certiorari will be found the order of the district court granting a supersedeas upon the judgment in question, and directing his admission to bail.

The petition for certiorari, as well as the petition for habeas corpus which accompanied it, were denied by this court March 2, 1903. (189 U. S., 509.)

The facts thus shown by petitioner's own statement in the former proceeding hardly consist with his present allegation that "from the date of said judgment to the said 13th day of April, A. D. 1903, he was imprisoned *under said judgment* in the county jail of the county of Almeda, *by the order of said court.*"

Courts will take judicial notice of their own records with reference to prior proceedings in the case at bar.

> See A. & E. Ency. Law (2d ed.), p. 925, and numerous English and American cases cited in note.

An appellate court will take judicial notice of its own record on a former appeal.

> *Gans* v. *Holland*, 37 Ark., 483.
> *Bell* v. *Williams*, 10 La., 514.
> *Thornton* v. *Webb*, 13 Minn., 498.
> *Dawson* v. *Dawson*, 29 Mo. App., 521.

This court also has held that it will take judicial notice of its own records on a former appeal.

> *Bienville Water Supply Co.* v. *Mobile*, 186 U. S., 212, 217.

The time a convicted party is detained pending his appeal does not run upon the sentence, even where no supersedeas is granted.

Exactly the same case as that here presented, except that no supersedeas was granted upon the judgment, was *Ex parte Duckett* (15 S. C., 210). Being right in point, I quote from it at length. Duckett had been sentenced by the county court to be imprisoned "in the State penitentiary, at hard labor, for the term of two years from this date, February 27, 1879." Pending his appeal to the Supreme Court, he was detained in the county jail. Upon an application for habeas corpus upon the ground, among others, that his sentence had expired two years from its date, the supreme court of South Carolina said (15 S. C., 211–213):

> The petitioners were delivered to the superintendent of the penitentiary, July 31, 1879, under the sentence that they should be "each imprisoned in the State penitentiary at hard labor for the term of two years." Two years

from the time they reached the penitentiary will not have expired until July 31, 1881, so that it is clear that the petitioners have not served out the time *in the State penitentiary* to which they were sentenced.

But in framing the sentence these words were added: "From this date, February 27, 1879," and it is urged that this being a matter touching the liberty of the citizen, the sentence should be construed literally, and that the two years' imprisonment in the penitentiary must be considered to have commenced at the date of the sentence, February 27, although the parties were not actually lodged in the penitentiary until July 31, 1879.

The judgment, though pronounced by the judge, is not his determination, but that of the law, which depends not upon the arbitrary opinion of the judge, but the settled and irreversible principles of justice. The substance of the sentence was that the petitioners should be "imprisoned in the State penitentiary, at hard labor, for the term of two years," and the date of the sentence, as also the time when it was directed to be carried into effect, was not of the essence of the sentence, but merely directory. Mr. Bishop lays down the law as follows: "Though the sentence to imprisonment ought properly to specify at what time it is to be carried out, yet *time is not of the essence of such a sentence.* Therefore a defendant who had been convicted of an assault was sentenced to imprisonment for two calendar months, 'from and after the 1st day of November next,' but did

not go into prison according to the sentence, and, at a subsquent term, it was decided that the sentence for two months' imprisonment be immediately executed; the proceeding was held to be correct." 1 *Bishop* on *Cr. Proc.*, sec. 878; *Kelly* v. *State*, 3 *Smedes & M.*, 518; *State* v. *Cockerham*, 2 *Ired. L.*, 204. In the case last cited, Judge Gaston, with great clearness, said: "The time at which a sentence shall be carried into execution forms no part of the judgement of the court. The judgment is the penalty of the law as declared by the court, while the direction with respect to carrying it into effect is in the nature of an award of execution. In this case the judgment was that the defendant be imprisoned two *calendar months*, and the words which follow in the record, 'from and after the 1st of November next,' direct the *time* of executing the judgment. The entry, indeed, would have been more formal had the judgment and the mandate for carrying it into effect been separate and distinct. But, however informal, it can be understood in conforming to the law as consisting of distinct parts, and, therefore, ought to be so understood."

So, in this case, the sentence was that the petitioners should be "imprisoned in the penitentiary, at hard labor, for the term of two years," while the direction with respect to carrying it into effect is in the nature of a mandate of execution.

This doctrine applies most appropriately to the case at bar. The absence of these parties from the penitentiary after sentence and before

July 31, 1879, was the result of their own act. They can not say that they were undergoing part of their sentence during that time. They had the right to appeal, and the delay of five months was caused by their exercising their right of appeal to this court for the purpose of arresting the judgment, which had to be pronounced before their appeal could be heard. (*State* v. *Rankin*, 3 S. C., 438.) During the time the appeal was being prosecuted the sentence was practically suspended, for it was proper not to enforce it pending appeal, the result of which might have been to reverse the judgment. The time spent in jail at Laurens, after sentence, can not be considered as in part execution of the sentence to "imprisonment in the penitentiary." It would have been false imprisonment to have detained them there under that sentence. They were there when they were convicted, and simply remained there awaiting the final determination of their trial, which was not ended until their appeal was dismissed. They did not commence to carry out the sentence until that time, July 28, 1879, when for the first time it was proper to enforce the sentence. The delay was as much their own act as if they had escaped confinement during the intermediate time. * * * We do not think the petitioners have served out "in the penitentiary" their full sentence of two years.

In *Ex parte Espalla* (109 Ala., 92) it was held that a convict confined in jail under sentence of imprisonment in the penitentiary was not entitled to be discharged from custody when the failure to remove him to the

penitentiary for the execution of his sentence was occasioned by his application for a writ of *habeas corpus*. In that case the supreme court of Alabama said (pp. 94–95):

> Why the authorities did not appear in Mobile sooner than the 23d to take petitioner to the penitentiary, we are not informed, and it is not necessary for us to decide whether for that reason there was any unlawful delay in the execution of the sentence or not; but one thing is manifest—that the petitioner is now complaining that he was not transferred on the 23d of January, and that he alone is to blame for the fact that he was not so transferred. He produced the delay and now complains of it; and, from the whole proceeding, it is not clear that he did not sue out the writ before Judge Williams for the very purpose of keeping himself from being taken to the penitentiary, a proceeding which, without dismissing, he repudiated by his subsequent applications, as having been granted by a judge who had no jurisdiction of the subject-matter. His case wears the appearance of an attempt to escape punishment on grounds which do not address themselves to us with favor. We see no reason for interfering, on what is before us, by our writ of *habeas corpus*.

A careful search has failed to discover any cases in which the rule has been held to be otherwise than as above stated, where the delay in executing the sentence was occasioned by appellate proceedings on the part of the convicted party.

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The rule announced in the Mills case (135 U. S., 263), that a sentence to imprisonment in the penitentiary must be for a longer period than one year, has no application.

Petitioner *was* sentenced for a longer period than one year.

In the Mills case there were not only two indictments, but two separate and distinct sentences, one for a year and the other for six months.

In this case the district court gave but one sentence for two years upon the verdict of conviction. The fact that petitioner was convicted upon two counts is wholly immaterial, even if each count is to be treated as a separate indictment. For aught that appears, the court may have sentenced upon one count only and disregarded the verdict of conviction upon the other. So, too, if one count of the indictment were defective, the conviction on the other would be sufficient to support the judgment and sentence.

Claasen v. *United States*, 142 U. S., 140, 146.
Evans v. *United States*, 153 U. S., 584, 608.
Dimmick v. *United States*, 116 Fed. Rep., 825.

This court can not undertake to divide and distribute the sentence between the two counts.

If the sentence is erroneous in this respect, opportunity should be given the United States to have Dimmick resentenced in accordance with law upon the verdict against him.

In re Bonner, 151 U. S., 242, 262.
Haynes v. *United States*, 101 Fed., 817, 820.
Jackson v. *United States*, 102 Fed., 473, 490.

The question whether the facts charged in the indictment constituted an offense under the statute are not open to review on habeas corpus, since the district court had general jurisdiction of the class of offenses to which it belonged.

Ex parte Parks, 93 U. S., 18.
Ex parte Watkins, 3 Pet., 193.
Ex parte Yarbrough, 110 U. S., 651.
In re Coy, 127 U. S., 731.
In re Eckhart, 166 U. S., 481.

In *Ex parte Parks*, the court, speaking by Mr. Justice Bradley, said (93 U. S., 20):

> Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States), is a question which has to be met at almost every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy after final judgment, unless a writ of error lies to some superior court; and no such writ lies in this case. It would be an assumption of authority by this court, by means of the writ of habeas corpus, to review every case in which the defendant attempts to controvert the criminality of the offense charged in the indictment.

In *Ex parte Watkins* Chief Justice Marshall, after stating that a commitment by the judgment of a court of competent jurisdiction is a sufficient answer to a writ of habeas corpus intended to effect his discharge, said (3 Pet., 202, 203):

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> The judgment of a court of record whose jurisdiction is final is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact by deciding it. The counsel for the prisoner admit the application of these principles to a case in which the indictment alleges a crime cognizable in the court by which the judgment was pronounced, but they deny their application to a case in which the indictment charges an offense not punishable criminally according to the law of the land. *But with what propriety can this court look into the indictment?* We have no power to examine the proceedings on a writ of error, and it would be strange if, under color of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control. An imprisonment under a judgment can not be unlawful, unless that judgment be an absolute nullity; *and it is not a nullity if the* court has general jurisdiction of the subject, although it should be erroneous.

In *In re Coy* (127 U. S., 731, 738) it was said that the court would look into an indictment on an application for habeas corpus to see whether it charges an offense within the general jurisdiction of the trial court; but that "if the statute has invested the court which tried the prisoner with jurisdiction to punish a well-defined class of offenses, as forgery of its bonds or perjury in its courts, *its judgment as to what acts were*

necessary under these statutes to constitute the crime is not reviewable on a writ of habeas corpus." The court further said (127 U. S., 738):

> While we have attempted to answer the main argument of prisoners' counsel, that Congress had no power to punish an act not specifically intended to affect the election of a member of Congress, though the act was done with a felonious intent, and that if it has such power it has not exercised it, we thought it not necessary, under the principle laid down in *Ex parte Watkins*, to inquire into the sufficiency of the allegation of the more minute details of the offense as charged in the indictment. We are not here to consider it as on a demurrer before trial; but, *finding that the district court has a general jurisdiction of this class of offenses*, we proceed no further in the inquiries on that subject.

In *In re Eckhart*, where it was held that an error committed by the trial court in passing sentence was not a jurisdictional defect reviewable by habeas corpus, Mr. Justice White, speaking for the court, said (166 U. S., 481):

> The case is analogous in principle to that of a trial and conviction upon an indictment, the facts averred in which are asserted to be insufficient to constitute an offense against the statute claimed to have been violated. In this class of cases it has been held that a trial court *possessing general jurisdiction of the class of offenses within which is embraced the crime sought to be set forth in the indictment* is possessed of authority

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to determine the sufficiency of an indictment, and that, in adjudging it to be valid and sufficient, acts within its jurisdiction and a conviction and judgment thereunder can not be questioned on habeas corpus, because of a lack of certainty or other defect in the statement in the indictment of the facts averred to constitute a crime.

The judgment and order appealed from should be affirmed.

HENRY M. HOYT,
Solicitor-General.

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